Supreme Court, U.S.
FILED
MAR 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1434

In the Supreme Court of the United States

October Term, 1985

JAMES TIERNEY, *et al.*,
Petitioners,

vs.

CITY OF TOLEDO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT TOLEDO POLICE PATROLMAN'S ASSOCIATION'S BRIEF IN OPPOSITION

TED IORIO, *Counsel of Record*
GALLON, KALNIZ & IORIO CO., LPA
3161 N. Republic Boulevard
Toledo, Ohio 43615
(419) 535-1976
Counsel for Respondent Toledo Police Patrolman's Association

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

28pp

RESTATEMENT OF THE QUESTION PRESENTED

1. Whether the agency shop fee rebate procedure established by the Toledo Police Patrolman's Association conforms to the constitutional parameters established by this Court for the protection of non-members' First and Fourteenth Amendment rights.

TABLE OF CONTENTS

RESTATEMENT OF THE QUESTION PRESENTED 1
TABLE OF CONTENTS II
TABLE OF AUTHORITIES III
OPINIONS BELOW 2
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
COUNTERSTATEMENT OF THE CASE 2
REASONS WHY THE PETITION SHOULD BE DENIED 6

I. The Rebate Procedure Employed by the Respondent Toledo Police Patrolman's Association Conforms to the Standards for Such Procedures Set Forth in This Court's Recent Decision in *Chicago Teachers Union v. Hudson* 6

II. The United States Court of Appeals for the Sixth Circuit Fully Considered the Issues Before it and Was Correct in Its Affirmation of the Lower Court's Opinion 12

III. The Decision Below Presents No Conflict With Either the Decisions of This Court or the Decision of the Supreme Judicial Court of Massachusetts 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 14, 15, 18
Armstrong v. Manzo, 380 U.S. 545 (1965) 19
Brotherhood of Railway and Steamship Clerks v. Allen, 375 U.S. 113 (1963) 14, 23
Buckley v. Valeo, 424 U.S. 1 (1976) 18
Champion v. California, 738 F.2d 1082 (9th Cir. 1984) 14
Chicago Teachers Union, Local No. 1 v. Hudson, 54 U.S.L.W. 4231 (March 4, 1986) ..... *passim*
C.S.C. v. Letter Carriers, 413 U.S. 548 (1973) 18
Ellis v. B.R.A.C., ... U.S. ....., 104 S. Ct. 1883 (1984) 14, 15, 16
Elrod v. Burns, 427 U.S. 347 (1976) 16, 17
Hudson v. Chicago Teachers Union, 743 F.2d 1187 (7th Cir. 1984) 9, 14, 20
Hudson v. Palmer, ... U.S. ....., 104 S. Ct. 3194 (1984) 19
International Association of Machinists v. Street, 367 U.S. 740 (1961) 14, 16
Kusper v. Pontikes, 414 U.S. 51 (1973) 16
Lee v. Western Reserve Psychiatric Habilitation Center, 747 F.2d 1062 (6th Cir. 1984) 19
McDonald v. City of West Branch, ... U.S. ....., 104 S. Ct. 1799 (1984) 7
Mathews v. Eldridge, 424 U.S. 319 (1976) 19
NAACP v. Button, 371 U.S. 415 (1962) 16
Railway Employees Department v. Hanson, 351 U.S. 225 (1956) 15

Robinson v. New Jersey, 741 F.2d 598 (3rd Cir. 1984) 14
School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 431 N.E.2d 180 (1982) 20, 21, 22, 23
Shelton v. Tucker, 364 U.S. 479 (1960) 17
Tierney v. City of Toledo, 116 LRRM 3475 (1984) 2

Statutes

Ohio Revised Code §4117.01 *et seq.* 3, 5
Toledo Municipal Code §2129.97 ..... 3, 5

No. 85-1434

In the Supreme Court of the United States

October Term, 1985

JAMES TIERNEY, *et al.*,
Petitioners,

vs.

CITY OF TOLEDO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT TOLEDO POLICE PATROLMAN'S ASSOCIATION'S BRIEF IN OPPOSITION

The Respondent Toledo Police Patrolman's Association respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Sixth Circuit's opinion in this case. The Sixth Circuit's opinion, which was not designated for full text publication, is reproduced in Appendix A of the Petition for a Writ of Certiorari.

OPINIONS BELOW

The Respondent accepts the Petitioners' statement of the opinions below, but wishes to notify the Court that the District Court's initial denial of Petitioners' request for injunctive relief, which was not appealed, is reported at 116 LRRM 3475 (B.N.A. 1984).

JURISDICTION

The Respondent does not contest the statement of jurisdictional grounds set forth in the Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent does not contest the Petitioners' statement of relevant statutory provisions set forth in the Petition for a Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

The Respondent Toledo Police Patrolman's Association adopts by reference the findings of fact as set forth by the United States District Court for the Northern District of Ohio, Western Division in its Memorandum and Order of March 26, 1985. *See* Petition Appendix C. The pertinent facts can be simply stated. In March, 1983, Respondent City of Toledo enacted an ordinance establishing an agency shop and recognizing the Toledo Police Patrolman's Association (hereinafter referred to as the "TPPA"), as the sole and exclusive representative of To-

ledo police patrolmen. *See* Toledo Municipal Code §2129.97, reproduced in Petition Appendix D.[1] The Toledo ordinance mandates that all Toledo police patrolmen either become members of the TPPA or pay a service fee to the TPPA to defray the costs of collective bargaining activities. The amount of the service fee, by ordinance, may not exceed the amount TPPA members pay as dues. The ordinance further requires the establishment of a rebate procedure by which non-members may recover any portion of their service fees expended for controversial causes or activities of a political nature. Thus, under the Toledo ordinance, non-members are left to pay only the cost of the TPPA's activities on their behalf relevant to wages, hours and conditions of employment.

In fulfillment of the ordinance's rebate requirement, the TPPA established a comprehensive rebate procedure.[2] Simply stated, the TPPA rebate procedure provides for an independent arbitrator to ascertain the amount of service fees to be refunded. As reflected in the District Court's findings of fact, the TPPA will retain an independent arbitrator from the National Academy of Arbitrators, but will not play any role in the selection of the particular arbitrator.

The first year that the rebate procedure is in effect, non-members must pay an agency shop fee equal to one hundred percent (100%) of membership dues. The full one hundred percent (100%) of the agency shop fee must

---

1. Subsequent to the enactment of Toledo Municipal Code §2129.97, the Ohio legislature enacted comprehensive public employee bargaining legislation. *See* Ohio Revised Code §4117.01 *et seq.*

2. The rebate procedure is detailed in a September 27, 1983 affidavit of TPPA President, William A. Dunn, which was filed with the District Court. The Petitioner has included the substance of this affidavit in Petition Appendix D.

be placed in an interest bearing escrow account pending a determination by the impartial arbitrator as to the amount to be rebated. The amount of the rebate is that amount of the fees used to support partisan political activities or ideological causes "not germane to the work or policy of the Toledo Police Patrolman's Association in the realm of collective bargaining". *See* Petition Appendix D, at 30a. The difference between the ascertained amount of dues and the actual agency shop fee as determined by the arbitrator, will be refunded with interest to the non-members. In subsequent years the TPPA will escrow the amount of the prior year's rebate plus five percent (5%). Non-members will thereby avoid having to pay the full amount of member dues for the TPPA's immediate use. The TPPA is, in essence, denied access to the portion of non-member agency shop fees, plus five percent (5%), which would have been spent on political and/or ideological causes.

In determining the amount of the rebate, the TPPA has the burden of establishing, on an annual basis, the amounts expended on collective bargaining, contract administration, and grievance resolutions. The District Court noted that, while it was "possible" the annual refund might, in some years, exceed the amount of agency shop fees in escrow, any such excess would be *de minimis*. The District Court further found that such *de minimis* amounts would neither substantially advance the TPPA's political activities nor impair non-members' ability to support political causes of their own choice. Finally, under the Toledo ordinance, non-members are permitted to pursue judicial redress for any actionable claims arising out of the implementation of the TPPA rebate procedure.

The above-outlined rebate procedure was challenged by seventeen (17) non-member Toledo police patrolmen;

the Petitioners in the instant action. On May 12, 1983, the Petitioners filed suit in the United States District Court for the Northern District of Ohio, Western Division to enjoin the TPPA's collection of agency shop fees pursuant to Toledo Municipal Code §2129.97.[3] On August 2, 1984, the District Court denied the Petitioners' Motion for Preliminary Injunction. Shortly thereafter, the District Court stayed all proceedings pending implementation of the rebate procedure. The Petitioners failed to remit agency fees in compliance with this order, and notified the District Court of their refusal to do so. After giving notice, the TPPA initiated a suit in the Toledo Municipal Court for the collection of the Petitioners' nonmember agency fees (*TPPA v. Tierney,* CVE-84-15149). Petitioners unsuccessfully moved the District Court to enjoin the Municipal Court collection proceeding. The TPPA's Motion for Summary Judgment was granted by the District Court on March 26, 1985. *See* Petition Appendix C.

On January 14, 1986, the United States Court of Appeals for the Sixth Circuit affirmed both the District Court's second denial of injunctive relief to Petitioners and its award of summary judgment to the TPPA in a consolidated appeal. For the reasons that follow, the Petition for a Writ of Certiorari must be denied, and the January 14, 1986 affirmation of the United States Court of Appeals for the Sixth Circuit must stand.

---

3. In its recent public bargaining legislation, the Ohio legislature has expressly authorized "the deduction of a fair share fee by the public employer from the payroll check of the employee . . . . [An] internal rebate procedure shall provide for a rebate of expenditures in support of partisan politics or ideological causes not germaine [sic] to the work of employee organizations in the realm of collective bargaining." *See* Ohio Revised Code §4117.09(C).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE REBATE PROCEDURE EMPLOYED BY THE RESPONDENT TOLEDO POLICE PATROLMAN'S ASSOCIATION CONFORMS TO THE STANDARDS FOR SUCH PROCEDURES SET FORTH IN THIS COURT'S RECENT DECISION IN CHICAGO TEACHERS UNION V. HUDSON.

The Petition for a Writ of Certiorari should be denied on the ground that the agency shop fee rebate procedure employed by the TPPA meets the three essential criteria for a valid rebate scheme set forth in this Court's recent opinion *Chicago Teachers Union, Local No. 1 v. Hudson*, 54 U.S.L.W. 4231 (March 4, 1986). The *Hudson* decision establishes the minimal constitutional requirements governing the proper collection of non-member agency fees. The three part test established by this Court calls for:

> adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

See 54 U.S.L.W. at 4236. The TPPA's rebate procedure conforms to the above requirements. Review of the decision below is therefore unnecessary.

With reference to the first element of the *Hudson* test, the TPPA's rebate procedure provides adequate explanation of the basis for the amount of agency fees elicited from non-members. The TPPA plan does not grant an arbitrary advance reduction for non-member dues, a practice which constituted one of the major flaws in the rebate

procedure employed by the union in the *Hudson* case. Unlike the union in *Hudson,* the TPPA escrows one hundred percent (100%) of non-member dues the first year in order that no portion of the non-member dues can be utilized until such time as a legitimate basis for the amount of the agency fee can be determined. At the conclusion of the first year, when adequate expense records have been compiled, the TPPA's rebate procedure requires that an independent arbitrator evaluate the year's expenditures to determine the amount of the rebate.[4] The following year, the amount of the previous year's rebate plus five percent (5%) is placed into escrow. Thus, no determination as to the actual amount of the agency shop fee is made until the Union has carried forth its burden of justifying the amount of the rebate before an impartial arbitrator.

In *Hudson,* this Court would not go so far as to hold that a one hundred percent (100%) escrow of non-member agency fees was "constitutionally required". This Court noted that:

---

4. Petitioners have advanced the makeshift argument that "this Court has only empowered arbitrators to determine the 'law of the shop,' not the supreme constitutional law of the land." *See* Petition at 11. The arbitrator, of course, only determines the amount of the rebate as based upon the union's ability to carry forth its burden of establishing, through legitimate documentation, its entitlement to any portion of the non-member agency shop fees. In the context of the agency shop, this Court has held that " '[w]here an arbitral determination gives full consideration to an employee's [statutory or constitutional] rights, a court may properly accord it great weight.' " *See McDonald v. City of West Branch,* ___ U.S. ___, 104 S. Ct. 1799, 1804 n.13 (1984). The arbitrator does not decide issues of constitutional law. The constitutional parameters have been established, most recently, in this Court's affirmation of the Seventh Circuit's decision in *Hudson.* Once the internal union procedure has been found to comply with the requirements of this Court, the union "should be entitled to insist that the arbitration procedure be exhausted. . . ." *See* 54 U.S.L.W. at 4236 (White, *J.*, concurring).

> [s]uch a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain.

See 54 U.S.L.W. at 4236. The TPPA nonetheless denies itself access to any portion of the agency shop fees placed in escrow that first year, even though it is "unquestionably entitled" to some portion of the escrowed funds to help defray the costs of administering the collective bargaining agreement on behalf of the dissenting nonmembers. The TPPA foregoes its entitlement to any of the escrowed funds that first year in the interest of ensuring that the amounts in question can be adequately justified. Therefore, in subsequent years when the Union bases the escrowed amount on the previous year's rebate, the procedure will be in conformity with the following admonition contained in the *Hudson* opinion:

> If the Union chooses to escrow less than the entire amount . . . it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure itself must be independently verified.

See 54 U.S.L.W. at 4236, n.23.

Not only does the TPPA procedure tailor the amount placed in escrow to the amount of the previous year's rebate, an additional five percent (5%) protective "cushion" is added to the escrowed amount to minimize the risk that the current year's political expenditures could exceed the amount in escrow. By comparison, in *Hudson* the union officials themselves computed a five percent (5%) advance reduction in fees, which included only a four/tenths of one percent (.4%) "cushion" for improper calculation. The procedure for determining the amount

of the agency fee in *Hudson* was therefore arbitrary and provided dissenting non-members with virtually no protective margin for error. Further, in *Hudson* the computation of the fee was undertaken by the union officials themselves. The union officials in *Hudson* did not have the burden of justifying the amount of non-member agency fees before an independent fact finder. All of these factors serve to distinguish the rebate procedure employed in the *Hudson* case from the rebate procedure proposed by the TPPA. The basis for the fees utilized by the TPPA for the purposes of administering the collective bargaining agreement on behalf of dissenting non-members is therefore adequately justified, as required by the first element of the test set forth by this Court in *Hudson*.

With reference to the second element of the test set forth in *Hudson*, the TPPA procedure provides dissenters with a "reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker". *See* 54 U.S.L.W. at 4236. "The non-union employee", notes *Hudson*, "is entitled to have his objections addressed in an expeditious, fair, and objective manner". The TPPA procedure, in contrast to the Chicago Teachers Union's procedure, is not "from start to finish . . . entirely controlled by the union". *See* 54 U.S.L.W. at 4235, quoting 743 F.2d at 1194-1195. The TPPA procedure is further distinguishable from that of the Chicago Teachers Union in that the TPPA does not have unrestricted control over the choice of the arbitrator. As noted in the District Court's factual findings in granting summary judgment to the TPPA, "the arbitrator will not be selected by or otherwise subject to the TPPA". *See* Petition Appendix C.

The TPPA rebate procedure is also as expedient as possible, given the annual nature of the dues collection

process. For example, in the first membership year, objections to the payment of agency shop fees were to have been made by November 1, 1983.[5] Within fourteen (14) days of the receipt of the objection, the TPPA was required to have mailed the dissenting non-member a copy of the rebate procedure and a copy of the 1983 TPPA budget. No later than January 31, 1984 the TPPA was required to have retained a member of the National Academy of Arbitrators to determine the percentage of the TPPA's total expenditures in support of political or ideological causes for the 1983 membership year. Final rebate checks were to have been issued within three (3) weeks of the arbitrator's determination. Thus, in the first year of the procedure as drafted, when the full one hundred percent (100%) of the fees are escrowed, the time elapsed between the non-member's initial objection and the issuance of refund checks is relatively short.

In subsequent years the preliminary refund, consisting of the previous year's rebate plus five percent (5%) must be determined no later than two (2) weeks after the January 31st deadline for non-member objections. This preliminary amount is immediately placed into an interest bearing escrow account and, at the end of the membership year, is refunded with interest in the amount determined by the impartial arbitrator, and within three weeks of the arbitrator's determination. *See* Petition Appendix D.

The TPPA procedure is soundly based upon the membership year. This time frame is reasonable in view of the nature of the agency fee collection process. The first year of the rebate procedure, as drafted, involves a

---

5. As no dues were paid into escrow, the rebate procedure was not implemented in 1983 and no arbitrator was retained by the TPPA.

somewhat shorter time frame as a result of the date upon which the ordinance authorizing the agency shop was enacted. In subsequent years dissenting non-members are given the opportunity to object within the first month of the membership year and are issued a notice of preliminary refund with a written explanation and a copy of the year's budget before February 15th of the membership year. The union is required to retain the arbitrator at the end of the membership year. In view of the additional safeguards built into the TPPA rebate procedure —most notably the preliminary rebate, the independent arbitrator, and the interest bearing escrow account—the membership year constitutes a reasonably prompt period of time for the dissenting non-member to obtain an agency fee rebate.

With respect to the third element of the test set forth in *Hudson*, the escrow account established by the TPPA adequately protects the amount of the agency fee "reasonably in dispute" while challenges to the amount of the fee are pending. As noted above, this Court did not go so far as to require one hundred percent (100%) escrow of disputed agency fees. If the union chooses to escrow less than one hundred percent (100%), this Court cautioned that the limited escrow must be "carefully justif[ied]". The TPPA procedure has carefully justified the limited escrow of subsequent years' agency fees by basing the amount on the prior year's rebate and adding a five percent (5%) protective cushion. This practice falls well within the parameters set forth by this Court in *Hudson*.

In summary, the rebate procedure adopted by the Chicago Teachers Union contained numerous defects which prompted this Court to uphold the Seventh Circuit's invalidation of the procedure. These defects are not found

in the TPPA rebate procedure. The TPPA rebate procedure is distinguishable from the Chicago Teachers Union's procedure and falls within the acceptable parameters established by this Court in its affirmation of *Hudson*. As noted in the *Hudson* concurrence:

> [I]f the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

See 54 U.S.L.W. 4236. The TPPA has provided for arbitration and has complied with all requirements set forth in the *Hudson* opinion. By virtue of this conformity, the *Hudson* opinion clearly resolves the issues raised in the Petition for a Writ of Certiorari. The Petition for a Writ of Certiorari must therefore be denied.

II. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FULLY CONSIDERED THE ISSUES BEFORE IT AND WAS CORRECT IN ITS AFFIRMATION OF THE LOWER COURT'S OPINION.

The United States Court of Appeals for the Sixth Circuit properly decided the issues before it in the case below. The essence of the Court's holding can be summarized in the following excerpts from the panel's well reasoned opinion:

> On appeal, the appellants raise several issues. Essential to each, though, is whether the district court was correct in ruling that §2129.97 of Toledo's Municipal Code is constitutionally valid under *Ellis v. Brotherhood of Railway Clerks*, ... U.S. ....., 104 S.Ct. 1883 (1984), *Abood v. Detroit Bd. of Education*,

431 U.S. 209 (1977), and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

Upon a review of the challenged Toledo city ordinance and of the agency shop rebate procedure addressed by the TPPA, Local 10, we are of the opinion that in the main they comport with the initial procedures which have been held to satisfy due process and the reported decisions as above cited. In so holding, we recognize that the plaintiffs have not as yet been permitted any extensive discovery which might ultimately bear upon whether the ordinance and plan will pass constitutional muster when they are in fact applied for those procedures are as yet untested and, though appearing fair, have not been adequately invoked. . . . [T]hose procedures and the procedures for the performing of the duties of the fee umpire and arbitrator are to be guided and controlled by the decisions of the United States Supreme Court in *Abood v. Detroit Board of Education, supra,* and other Supreme Court authority building upon those issues. Therefore, any conflicts which might otherwise cause us concern can be resolved by reference to those decisions and careful observance by all parties of the particulars of the plan as interpreted in the light of those decisions.

We do not perceive that due process requires us to anticipate issues which have not yet arisen or become ripe for decision and, of course, plaintiffs are not foreclosed from further postjudgment proceedings in the district court, should such problems arise.

See Petition Appendix A.

The Court of Appeals was correct in its admonition that the implementation of the rebate procedure must be strictly controlled by the decisions of the United States Supreme Court in *Abood* and its progeny. The rebate procedure adopted by the TPPA meets, and in some respects surpasses, the guidelines set forth by this Court concerning the collection of agency shop fees.

The United States Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), held agency shops in the public sector to be valid under federal law. The requirement that non-members help defray the costs of collective bargaining, contract administration, and grievance adjustment has been consistently upheld by federal courts interpreting *Abood*. *See e.g. Ellis v. B.R.A.C.*, ... U.S. ....., 104 S. Ct. 1883 (1984); *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 54 U.S.L.W. 4231 (March 4, 1986); *Champion v. California*, 738 F.2d 1082 (9th Cir. 1984); *Robinson v. New Jersey*, 741 F.2d 598 (3rd Cir. 1984). This Court has further recognized the rebate procedure as a viable method of safeguarding the rights of objecting non-members, who are required to pay their fair share of costs of union representation. *See Abood*, 431 U.S. at 242; *International Assn. of Machinists v. Street*, 367 U.S. 740, 774-775 (1961); *Brotherhood of Clerks v. Allen*, 373 U.S. 113, 122-124 (1963).

The vast and consistent progeny emanating from the *Abood* decision have established beyond dispute that all persons receiving the benefits of union representation must pay their fair share of the costs of such representation. *See Abood*, 431 U.S. at 222. This Court was not oblivious to the free expression implications of compelled contribution from non-members, however. A certain de-

gree of interference with First Amendment rights was held to be:

> constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

See Abood, 431 U.S. at 222, *quoting, Railway Employees Department v. Hanson,* 351 U.S. 225 (1956). Thus, it has long been acknowledged that First Amendment rights are "implicated" in the agency shop context, but that some degree of interference is justified in the interest of preserving the union shop. In the decade following the *Abood* decision, this Court has consistently sought to preserve the vitality of non-members' First Amendment interests, and, at the same time, preserve the union's right to contribution for its collective bargaining efforts. Toward this goal, the collection of agency fees has been conditioned upon the caveat that such fees may not be used to fund ideological causes to which non-member employees are adverse.

A proper rebate procedure is the decisive factor in determining whether non-member First Amendment rights have been adequately protected. In defining the two extremes, this Court has rejected the "pure" rebate system, whereunder non-members' fees are utilized for political or ideological purposes and the portion so utilized is refunded at a later date. *See Ellis v. B.R.A.C.,* 104 S. Ct. at 1889-90. At the opposite end of the spectrum, this Court's recent affirmation of the Seventh Circuit's decision in *Chicago Teachers Union v. Hudson* noted that a system requiring a one hundred percent (100%) escrow of non-member dues:

> [h]as the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain.

See 54 U.S.L.W. at 4236. As noted in *Ellis*:

> [t]he very nature of the free-rider problem and the governmental interest in overcoming it requires that the union have a certain flexibility in its use of compelled funds.

See Ellis, 104 S. Ct. at 1892. This Court has long been of the opinion that:

> [r]estraining the collection of all funds . . . sweeps too broadly.

See International Assn. of Machinists v. Street, 367 U.S. at 771.

The TPPA rebate procedure strikes a precise balance which adequately protects non-member rights to free expression while, at the same time, narrowly combatting the free-rider problem. The escrow plan adopted by the TPPA contains extraordinary safeguards which prevent the TPPA from utilizing non-member funds for inappropriate causes. The TPPA rebate plan exemplifies the "precision of regulation" demanded by this Court in the development of any law or procedure which tends to have an impact upon First Amendment rights. *See NAACP v. Button*, 371 U.S. 415, 438 (1962), *see also Elrod v. Burns*, 427 U.S. 347, 363 (1976).[6] As this Court noted in *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973):

---

6. The facts of *Elrod v. Burns* provide an instructive analogy to the agency shop context. The *Elrod* decision found that patronage dismissals of non-policy making government employees constituted a violation of the First and Fourteenth Amendments.

(Continued on following page)

> [i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

See also Shelton v. Tucker, 364 U.S. 479, 488 (1960).

The TPPA rebate procedure, in conformity with the *Kusper* holding, is no broader than is necessary to remedy the problem of free-riders. The TPPA rebate procedure is not unnecessarily restrictive, yet still ensures that non-members pay for the representation that the TPPA is required by law to provide. As exclusive representative for all Toledo police patrolmen, the TPPA bargains for non-members as well as members. *See* Petition Appendix D. The District Court in its findings of fact properly determined that the procedures utilized by the TPPA to compel payment of dues do not impair free speech beyond the temporary deprivation of *de minimis* amounts

---

Footnote continued—

This Court balanced the "contribution of patronage dismissals to [the] democratic process" against the degree of encroachment upon First Amendment freedoms and concluded that:

> [r]estraining political campaigning and management in the area of public employment leaves it free to continue in other settings. The consequence of no such restraint, however, is the complete restriction of individual belief and association for each public employee affected.

See Elrod, 427 U.S. at 371, n.27. By contrast, in the agency shop setting political restriction is neutralized by fee rebate procedures. The rebate procedure, to paraphrase *Elrod*, "leaves [political expression] free to continue in other settings." In *Elrod* the only way to banish the chilling effect of patronage practices upon free speech was to completely restrict political patronage dismissals. No outlet analogous to the rebate procedure was available to protect the public employees in *Elrod*. Thus, the agency shop fee rebate system provides a compromise whereby non-members remain free to express their political views while, at the same time, the union's interest in maintaining non-member support of union bargaining activities is served. In *Elrod*, this Court's goal was to ensure an outlet for free political speech. In the context of the agency shop, the same goal is effectuated by agency fee rebates.

of money which the non-members may (or may not) have used to fund political activities of their own choosing. The rebate procedure places the amount of the previous year's rebate plus five percent (5%) into an interest bearing escrow account, thus depriving the TPPA of access to that portion of the non-member dues. The five percent (5%) cushion adequately effectuates the union's intent to minimize the risk that any portion of the non-member agency fees will be used to advance union political causes.

The amount of the first year's rebate plus five percent (5%) as determined by an independent arbitrator, is placed into escrow in each subsequent membership year. The remainder of the second year's dues will be used for collective bargaining purposes only. The amount of the rebate for the second year plus five percent (5%) will determine the portion of non-member dues placed in escrow the third year, and so on. Thus, the TPPA procedure is flexible and is designed to be continually reflective of the actual percentages of non-member dues actually utilized for collective bargaining activities on the non-member's behalf. The procedure is therefore "closely drawn" within the meaning of this Court's mandate in *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), wherein this Court noted that "'[n]either the right to associate nor the right to participate in political activities is absolute.'" *See* 424 U.S. at 25, *quoting, C.S.C. v. Letter Carriers*, 413 U.S. 548, 567 (1973).

As *Abood* and its extensive progeny have demonstrated, the validity of the agency shop is a settled matter of law and the union's entitlement to non-member support cannot be disputed. *See Abood*, 431 U.S. at 242. The TPPA's escrow/neutral arbitration plan conforms not only

to the specific guidelines set in the context of the agency shop, but also meets the general requirements of due process as established in *Hudson v. Palmer,* ..... U.S. ....., 104 S. Ct. 3194 (1984); *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *Armstrong v. Manzo,* 380 U.S. 545 (1965); and *Lee v. Western Reserve Psychiatric Habilitation Center,* 747 F.2d 1062, 1068 (6th Cir. 1984). In conformity with *Mathews,* the TPPA rebate procedure is implemented before any final deprivation of property occurs. *See Mathews,* 424 U.S. at 333. In *Hudson v. Palmer,* this Court elaborated upon the element of finality as follows:

> [A]n intentional deprivation of property does not give rise to a violation of the Due Process Clause if the state provides an adequate post-deprivation remedy.

See Hudson v. Palmer, 104 S. Ct. at 3204, n.14.

The adequacy of the post-deprivation remedy in the instant case is exemplified by the close fit between the amount placed in escrow and the amount of the previous year's expenditures for political and ideological causes. The five percent (5%) protective cushion is tailored to ensure that, should the non-member be deprived of any amount in excess of his fair share, such amount will be *de minimis* and the "risk of erroneous decision" will therefore be low. *See Mathews,* 424 U.S. at 335. The rebate system is designed so that the amount of non-member fees truly "at risk" in any given year will be minimal. Petitioners greatly overstate the unsubstantiated contention that the City of Toledo is sanctioning endless arbitrary "takings".

In summary, the United States Court of Appeals for the Sixth Circuit properly based its affirmation upon the guidelines that this Court has established for the

implementation of agency fee rebates. Incorporating by reference the previous discussion of this Court's recent decision in *Chicago Teachers Union v. Hudson*, it is clear that even if the *Hudson* affirmation had antedated the decision below, the decision below would still stand firmly upon its own merits. For these reasons, the Petition for a Writ of Certiorari must be denied on the grounds that the United States Court of Appeals for the Sixth Circuit correctly decided the issues presented in the case below.

III. THE DECISION BELOW PRESENTS NO CONFLICT WITH EITHER THE DECISIONS OF THIS COURT OR THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

The Petitioners allege that the decision below presents a conflict with the Seventh Circuit's decision in *Hudson v. Chicago Teachers Union, supra; School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982) and with various lower court decisions which do not require exhaustion of union rebate procedures as a prerequisite to litigation. With respect to the alleged conflict with the Seventh Circuit's decision in *Hudson*, the above discussion of this Court's recent affirmation of that decision effectively distinguishes the rebate procedure utilized in *Hudson* and establishes the TPPA rebate procedure's conformity with the standards for rebate procedures set forth in that affirmation. Similarly, the *Hudson* decision also resolves Petitioners' allegations of a conflict in the area of whether exhaustion of arbitration procedures should be a prerequisite to litigation. The concurrence in the *Hudson* affirmation clarifies the Court's opinion on the issue of exhaustion of internal union remedies as follows:

> [A]s I understand the Court's opinion . . . . if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

See 54 U.S.L.W. at 4236 (White, *J.* concurring). With this clarification, the consistent line of case law requiring the exhaustion of valid internal union procedures was implicitly upheld.

The remaining case cited by Petitioners as presenting a conflict with the decision below is readily distinguishable from the facts at bar. The union in *Greenfield* utilized an agency shop scheme which called for payment of the entire amount of dues. The union made use of the full amount of non-member dues for "social, political, and speech activities" during the period between payment and refund. *See* 431 N.E.2d at 186. Further, the rebate procedure established by the union in the *Greenfield* case was characterized by the Court as "cumbersome to the extreme". *See* 431 N.E.2d at 188. The non-member fees were allocated among the Massachusetts Teachers Association, the National Education Association, and the local education association. Each entity had its own separate rebate procedure. The state and national procedures did not specify that the burden of proof would be on the collecting entity and dissenting non-members were not guaranteed access to the books and records upon which the return assessment would be based. All assessments were to be unilaterally made by the respective entity, whereafter the dissenting non-member was required to appeal first to the appropriate executive committee, then, finally, to arbitration which was also conducted separately by each of the entities. *See* 431 N.E.2d at 186, n.4.

This outrageously complicated ritual cannot reasonably be compared with the streamlined policy adopted by the TPPA. Every effort has been made to simplify the rebate procedure and provide adequate information to non-members at every stage of the proceedings. Further, the burden of establishing entitlement to non-member fees lies solely with the TPPA. The TPPA plan employs a one step objection to the amount of agency fees, followed by impartial arbitration. Any non-member who is still aggrieved following the arbitrator's determination remains free to pursue a judicial remedy. The court below expressly preserved the petitioners' right to pursue further claims in the judicial forum:

> We do not perceive that due process requires us to anticipate issues which have not yet arisen or become ripe for decision and, of course, plaintiffs are not foreclosed from further postjudgment proceedings in the district court, should such problems arise.

See Petition Appendix A.

The Supreme Court of Massachusetts acknowledged that:

> dissenting employees may constitutionally be required to pay the disputed fee into a neutral escrow account pending adjudication . . . .

See 431 N.E.2d at 189. The Supreme Court of Massachusetts thereby endorsed the escrow alternative, which was not a part of the *Greenfield* scheme, noting that:

> [e]scrowing the fees ensures that the organization will receive the money it is entitled to and substantially reduces the interference with the organization's functions.

See 431 N.E.2d at 189, *citing, Allen, supra,* 373 U.S. at 120. Thus, the *Greenfield* decision does not represent a divergent opinion upon the same facts as the case below. Rather, it is a decision arriving at a different result on the basis of distinguishable facts. The decision below does not present a conflict when viewed in light of the Supreme Court of Massachusetts' decision, therefore, the alleged conflict should not be used as a basis for granting the Petition for a Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

TED IORIO, *Counsel of Record*
GALLON, KALNIZ & IORIO CO., LPA
3161 N. Republic Boulevard
Toledo, Ohio 43615
(419) 535-1976
Counsel for Respondent Toledo Police Patrolman's Association